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Kamaraj a/l Rajahendran v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05(SH)-29–01 OF 2022
HADHARIAH SYED ISMAIL, AZMI ARIFFIN AND SM KOMATHY JJCA
21 JUNE 2024

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under 302 of Penal Code ('PC') for murder — Appellant convicted of culpable homicide not amounting to murder under s 299 of PC and sentenced to 18 years of imprisonment — Whether identity of deceased was D *identified — Whether evidence of prosecution witness credible — Whether trial judge failed to consider appellant's defence — Whether deceased died due to injuries sustained — Whether sentence manifestly excessive*

Menaga Gunasegaran ('PW3') operated a flower stall at Senawang. She had E employed one Selvam, a 39-year-old Indian national to help her run the stall. At about 4.10pm on 27 November 2016, the appellant, Kumaravelan ('Kumar') and Thanabalan came in a Honda car to PW3's stall. Selvam was later bundled into the car and taken away. Around 9.30pm that night, Selvam was rushed by ambulance to the hospital with severe head injuries and F succumbed to his injuries the next morning. The appellant and the two other accused were subsequently arrested and charged under s 302 of the Penal Code ('the PC') for the murder of Selvam. However, Thanabalan passed away before the commencement of the trial. PW3 testified that she had saved some money to get married to the appellant with whom she was in a relationship at the time. G The money was given to Selvam for safe keeping. On 25 November 2016, she complained to the appellant that Selvam had refused to hand over the money entrusted with him. To resolve the matter, the appellant came over to the stall on 27 November 2016, with the two other accused. PW3 added that the appellant confessed to her that Selvam was in the hospital as the three of them H had assaulted him. The trial judge found that the prosecution had established a prima facie case against the appellant and Kumar, and they were called to make their defence. The appellant and Kumar gave evidence that they had taken Selvam with the intention of handing him over to immigration, but on the way Thanabalan stopped at an abandoned house and dragged Selvam into I the house where he assaulted. They maintained that it was Thanabalan who had inflicted the injuries on Selvam. The appellant also denied confessing to PW3 that he and his friends had assaulted Selvam. At the conclusion of the trial, the trial judge convicted the appellant and Kumar of culpable homicide not amounting to murder under s 299 of the PC, punishable under s 304(a) of

the PC. The appellant and Kumar were sentenced to 18 years and 13 years of imprisonment, respectively. Dissatisfied, the appellant appealed against conviction and sentence.

Held, dismissing the appeal:

(1) The appellant's submission that there was no evidence to show that the deceased was Selvam was unfounded as PW3 had identified the deceased as her employee Selvam. It was uncontroverted that she had identified the body at the hospital on a later date and also from his photograph. The defence submission that the charge stated that the deceased was one Selvam Muthusamy but the evidence led by the prosecution did not establish this fact, was unfounded. The charge initially identified the deceased as Selvam Muthusamy but the charge was subsequently amended to read Selvam (see paras 26–27).

(2) The conclusion of the trial judge that the appellant had confessed to PW3 was a finding of fact which the court would hesitate to disturb unless it could be shown that it was clearly reached against the weight of the evidence. As such, it could not be persuaded that there was merit in this ground of appeal (see para 29).

(3) The was no merit on the complaint that the trial judge had failed to adequately consider the defence of the appellant. It made no sense and was unbelievable that Thanabalan would commit an unprovoked and brutal assault on Selvam when he had no motive to do so. The one who was angry with Selvam was the appellant as the latter had used up the monies he and PW3 had saved to get married. The fact that only Thanabalan's DNA was found on Selvam did not ipso facto mean that the other two had not participated in the assault (see para 32).

(4) The appellant must abide by the petition of appeal and should submit solely on the points of law or fact as set out in the petition of appeal and should not seek to raise points of law or fact not set out in the petition of appeal. In any event, it was clear from the evidence given by the pathologist that even if Selvam had received intensive medical treatment, there was only a very slim chance that he would have survived (see para 35).

(5) In imposing the 18-year imprisonment term the trial judge had considered the nature of the offence. The fact that Selvam had used the monies saved for the appellant's upcoming wedding, did not provide the appellant with any just cause to assault Selvam. The assault was unprovoked and committed on a harmless person. Selvam was grossly outnumbered, and they had left the unconscious Selvam in an open ground to ensure that they were not implicated with the offence. The sentence was not manifestly excessive (see paras 39–40).

[Bahasa Malaysia summary

Menaga Gunasegaran ('PW3') mengendalikan sebuah gerai bunga di Senawang. Dia telah mengambil seorang pekerja bernama Selvam, seorang warga India berusia 39 tahun, untuk membantunya menguruskan gerai tersebut. Pada kira-kira jam 4.10 petang pada 27 November 2016, perayu, Kumaravelan ('Kumar') dan Thanabalan datang ke gerai PW3 dengan sebuah kereta Honda. Selvam kemudiannya dipaksa masuk ke dalam kereta dan dibawa pergi. Sekitar jam 9.30 malam pada malam yang sama, Selvam dikejarkan ke hospital dengan ambulans kerana mengalami kecederaan kepala yang teruk dan meninggal dunia pada keesokan harinya. Perayu dan dua tertuduh lain kemudian ditangkap dan didakwa di bawah s 302 Kanun Keseksaan ('KK') atas tuduhan membunuh Selvam. Walau bagaimanapun, Thanabalan meninggal dunia sebelum perbicaraan bermula. PW3 memberi keterangan bahawa dia telah menyimpan sejumlah wang untuk berkahwin dengan perayu yang pada masa itu merupakan teman lelakinya. Wang tersebut telah diberikan kepada Selvam untuk disimpan dengan selamat. Pada 25 November 2016, dia mengadu kepada perayu bahawa Selvam enggan memulangkan wang yang diamanahkan kepadanya. Untuk menyelesaikan perkara itu, perayu datang ke gerai pada 27 November 2016, bersama dua tertuduh yang lain. PW3 menambah bahawa perayu mengaku kepadanya bahawa Selvam berada di hospital kerana mereka bertiga telah menyerangnya. Hakim bicara mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu dan Kumar, dan mereka dipanggil untuk membela diri. Perayu dan Kumar memberikan keterangan bahawa mereka telah membawa Selvam dengan niat untuk menyerahkannya kepada imigresen, tetapi dalam perjalanan Thanabalan berhenti di sebuah rumah terbiar dan menarik Selvam ke dalam rumah tersebut di mana dia diserang. Mereka menegaskan bahawa Thanabalan yang menyebabkan kecederaan kepada Selvam. Perayu juga menafikan mengaku kepada PW3 bahawa dia dan rakannya telah menyerang Selvam. Pada akhir perbicaraan, hakim bicara mensabitkan perayu dan Kumar atas kesalahan membunuh tanpa niat di bawah s 299 KK, yang boleh dihukum di bawah s 304(a) KK. Perayu dan Kumar masing-masing dijatuhi hukuman penjara 18 tahun dan 13 tahun. Tidak berpuas hati, perayu merayu terhadap sabitan dan hukuman.

Diputuskan, menolak rayuan:

(1) Hujahan perayu bahawa tiada keterangan menunjukkan bahawa si mati adalah Selvam adalah tidak berasas kerana PW3 telah mengenal pasti si mati sebagai pekerjanya, Selvam. Ia tidak dipertikaikan bahawa dia telah mengenal pasti mayat di hospital pada kemudiannya dan juga melalui fotonya. Hujahan pihak pembelaan bahawa pertuduhan menyatakan si mati sebagai Selvam Muthusamy tetapi keterangan yang dikemukakan oleh pendakwaan tidak membuktikan fakta ini, adalah tidak berasas. Pertuduhan pada mulanya mengenal pasti si mati sebagai Selvam

Muthusamy, tetapi pertuduhan itu kemudiannya dipinda untuk hanya menyebut Selvam (lihat perenggan 26–27).

(2) Kesimpulan hakim bicara bahawa perayu telah mengaku kepada PW3 adalah satu dapatan fakta yang mahkamah adalah berat untuk mengganggu melainkan dapat ditunjukkan bahawa keputusan itu jelas bercanggah dengan berat keterangan. Oleh itu, tidak dapat diyakinkan bahawa terdapat merit dalam alasan rayuan ini (lihat perenggan 29).

(3) Aduan bahawa hakim bicara gagal mempertimbangkan pembelaan perayu secara mencukupi tidak mempunyai merit. Ia tidak masuk akal dan tidak dapat dipercayai bahawa Thanabalan akan melakukan serangan yang tidak diprovokasi dan kejam ke atas Selvam apabila dia tiada motif untuk berbuat demikian. Orang yang marah dengan Selvam adalah perayu kerana Selvam telah menggunakan wang yang dia dan PW3 simpan untuk berkahwin. Fakta bahawa hanya DNA Thanabalan yang ditemui pada Selvam tidak bermakna ipso facto bahawa dua yang lain tidak turut serta dalam serangan tersebut (lihat perenggan 32).

(4) Perayu hendaklah petisyen rayuan dan harus mengemukakan hujahan semata-mata berdasarkan perkara undang-undang atau fakta seperti yang dinyatakan dalam petisyen rayuan dan tidak boleh cuba mengemukakan perkara undang-undang atau fakta yang tidak dinyatakan dalam petisyen rayuan. Dalam apa jua keadaan, adalah jelas daripada keterangan yang diberikan oleh ahli patologi bahawa walaupun Selvam telah menerima rawatan perubatan intensif, peluang untuk dia terselamat adalah sangat tipis (lihat perenggan 35).

(5) Dalam menjatuhkan hukuman penjara 18 tahun, hakim bicara telah mempertimbangkan sifat kesalahan tersebut. Hakikat bahawa Selvam telah menggunakan wang yang disimpan untuk perkahwinan perayu yang akan datang, tidak memberikan sebarang sebab yang sah kepada perayu untuk menyerang Selvam. Serangan itu tidak diprovokasi dan dilakukan ke atas seseorang yang tidak berbahaya. Selvam adalah bersendirian, dan mereka telah meninggalkan Selvam yang tidak sedarkan diri di tanah lapang untuk memastikan bahawa mereka tidak terlibat dengan kesalahan tersebut. Hukuman tersebut tidak keterlaluan (lihat perenggan 39–40).]

Legislation referred to

Evidence Act 1950 s 17
Penal Code ss 299, 302, 304(a), (b)

Appeal from: Criminal Trial No NA-45B-20–10 of 2017 (High Court, Seremban)

Paul Krishnaraja a/l Selladurai (with Amy Chong Chan Ling and Goh Chee Kian)

(Paul, Amy Chong & Assoc) for the appellant.
Norzilawati Izhani Zainal @ Zainol (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

SM Komathy JCA:

INTRODUCTION

[1] The appellant, Kumaravelan ('Kumar') and Thanabalan were jointly charged under s 302 of the Penal Code for the murder of one Selvam, a 39 year old Indian national. However, Thanabalan passed away before the commencement of the trial.

[2] The amended charge against the appellant and Kumaravelan was as follows:

> Bahawa kamu bersama-sama dengan seorang yang telah meninggal dunia, pada 27 November 2016, di antara jam 3.30 petang hingga 8 malam, bertempat di sebuah kawasan sekolah Seremban Selatan, Senawang, di dalam daerah Seremban, di dalam Negeri Sembilan Darul Khusus, dengan niat bersama telah membunuh SELVAM dengan itu, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama dengan s 34 Kanun Keseksaan.

[3] At the conclusion of the trial, the trial judge convicted the appellant and Kumar of culpable homicide not amounting to murder under s 299, punishable under s 304(a) of the Penal Code. The appellant and Kumar were sentenced to 18 years and 13 years of imprisonment, respectively. The appellant being dissatisfied with the decision has appealed to this court against conviction and sentence.

BACKGROUND

[4] Menaga Gunasegaran ('PW3') operated a flower stall at Senawang. She had employed the deceased Selvam to help her run the stall. At about 4pm on 27 November 2016, the appellant and the two other accused came in a Honda car to Menaga's stall. Selvam was later bundled into the car and taken away. Around 9.30pm that night, Selvam was rushed by ambulance to Hospital Tengku Jaafar Seremban with severe head injuries and succumbed to his injuries the next morning.

[5] The appellant and the two other accused were subsequently arrested and charged with Selvam's murder.

PROSECUTION CASE

[6] The prosecution's case against the appellant and Kumar was based on circumstantial evidence and a confession allegedly made by the appellant to Menaga.

[7] Menaga was the star witness for the prosecution. She testified that she had saved some money to get married to the appellant with whom she was in a relationship at the time. The money was given to Selvam for safe keeping. On 25 November 2016, she telephoned the appellant and complained to him Selvam had refused to hand over the money entrusted with him. To resolve the matter, the appellant came over to the stall on 27 November 2016, with the two other accused.

[8] According to Menaga, the appellant questioned Selvam for some 15 minutes. Selvam admitted to the appellant that he had used part of the money and sought time to pay it back. This enraged the appellant and he dragged Selvam out and pushed into the car with the assistance of Kumar. Thanabalan remained seated in the car at all times.

[9] Menaga added that later that day the appellant had sent to her Whatsapp a video recording that showed Selvam had sustained serious injuries and his hands tied to his back. The appellant then came to see her and confessed to her that Selvam was in the hospital as the three of them had assaulted him. The appellant came again two days later to ask her for money to clean the car as Selvam's blood stains were in the car.

[10] The next witness called by the prosecution was one Visagan Eaghanathan ('PW2'), a police officer who was attached to Bukit Aman at the time. PW2 and the appellant were friends. PW2 testified that the appellant had telephoned him around 5pm on the date of the incident and informed him someone had broken into his workshop. When PW2 went to the workshop, the appellant informed him that the person ('the person') had been apprehended and handed over to the immigration.

[11] PW2 also testified that he received another phone call from the appellant the same day around 7.40pm. This time the appellant informed him he was bringing the person to Seremban Selatan. Whereupon PW2 suggested that the appellant bring the person to SMK Seremban Jaya instead, as it was closer to PW2's home. PW2 then proceeded to the school and found a male Indian lying on the ground in an open area near the school. The appellant and Kumar were near Selvam, whilst Thanabalan was seated in the car.

[12] PW2 advised the appellant to call the police or ambulance as Selvam had serious injuries.

[13] PW4, an ambulance driver at Hospital Tengku Jaafar Seremban testified that he received a call from PW2 that a person involved in a fight near the school was injured and needed help. The ambulance arrived at the school about 8.10pm and rushed an unconscious Selvam to Hospital Tengku Jaafar Seremban.

[14] The government pathologist ('PW8') who performed the autopsy on Selvam found serious injuries to his head and 67 other injuries on his body. In his report, he noted as follows:

> Post-mortem examination revealed head injuries comprising of brain oedema with associated subdural and subarachnoid haemorrhages [bleed] of the brain which had led to his death. These head injuries were consistent with sustaining them from a blunt force type trauma. There were no significant disease processes found on the body which could have caused or contributed to the death. In my opinion, the cause of death is attributable to the blunt force injuries of the head as sustained by the deceased.

[15] The police found a wooden stick and a pipe at the abandoned house where Selvam had been assaulted.

[16] Having considered the prosecution evidence on maximum evaluation and credibility of prosecution witnesses, the trial judge found that the prosecution had established a prima facie case against the appellant and Kumar and called upon them to make their defence.

DEFENCE

[17] The appellant and Kumar gave evidence on oath. Both did not deny Selvam was picked up from the flower stall on the date of the incident. According to them, they had taken him with the intention of handing him over to Immigration, but on the way Thanabalan stopped at an abandoned three story house and dragged Selvam into the house where he assaulted him with a stick. On seeing this, the both of them managed to restrain Thanabalan from continuing to strike Selvam.

[18] It was their evidence, that thereafter the appellant phoned PW2 who advised them to bring Selvam to the school and wait for him. PW2 arrived at the school and told them to call for the ambulance. On PW2's instructions, they left before the ambulance came.

[19] They maintained that they had no forethought of harming or killing

Selvam. It was Thanabalan who had inflicted the injuries on Selvam. The appellant also disputed Menaga's version of the facts. He denied having sent any video to her nor having confessed to her that he and his friends had assaulted Selvam.

A

THE TRIAL COURT'S DECISION

B

[20] The trial judge having examined all the evidence accepted Menaga's version of the facts as he found she had no reason to fabricate evidence against the appellant as she was in love with him and had planned to marry him. He ruled that the confession made to her by the appellant was admissible under s 17 of the Evidence Act 1950.

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[21] The trial judge also found that the injuries contained in the post mortem report were consistent with a brutal attack on Selvam. The trial judge rejected the appellant's defence that the horrific injuries on Selvam had been inflicted by Thanabalan and that he and Kumar were not involved. The trial judge concluded that the extensive injuries on Selvam's body could not have been inflicted by just one person and that they had been involved.

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[22] The trial judge, however, accepted their evidence that they had no intention to kill Selvam when they bundled him into the car and took him away. He found they must have initially intended to hand Selvam over to immigration but along the way decided for some reason instead to teach Selvam a lesson for taking the monies. As a result, they took Selvam to the abandoned house where he became a victim of sustained and brutal assault.

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[23] The court found on the evidence that the appellant and the two others had committed an unprovoked and brutal assault on Selvam with the intention of causing him injuries. They had struck Selvam on the head though it was clearly dangerous, and death was likely, even if it was not a practical certainty.

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[24] At the conclusion of the trial, the trial judge found that it had not been proved beyond reasonable doubt that the appellant and Kumar were guilty of murder. However, he concluded that the facts which were proved were sufficient to justify a conviction for the lesser offence of culpable homicide not amounting to murder under s 299 of the Penal Code. Therefore, he exercised the power granted to him under the Criminal Procedure Code to convict the appellant and Kumar of the lesser offence.

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GROUNDS OF APPEAL

[25] Before us, counsel for the appellant advanced five grounds of appeal in challenging the decision of the trial judge. They are as follows:

A (a) the learned trial judge erred in coming to the conclusion that there was sufficient credible evidence to show that the deceased was Selvam;

(b) that the learned trial judge erred in accepting Menaga's evidence that the appellant had confessed to her that he had assaulted Selvam;

B (c) that the learned trial judge erred in failing to consider the defence;

(d) that the learned trial judge did not consider that Selvam had died after having received several hours of treatment; and

(e) that the sentence imposed on the appellant was manifestly excessive.

C

First issue: Identity of deceased

[26] It is the appellant's submission that there was no evidence to show that the deceased in this case was Selvam. In our view, this submission is unfounded as Menaga had identified the deceased as her employee Selvam. It is true that she was not present to identify his body during the autopsy but it is uncontroverted that she had identified the body at the hospital on a later date and also from his photograph. Additionally, the investigating officer's evidence that he had taken Menaga to the Kuala Lumpur General Hospital to identify the deceased a few days after the autopsy was not challenged.

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[27] There is one other point. It was also the defence submission that the charge stated that the deceased was one Selvam Muthusamy but the evidence led by the prosecution did not establish this fact. In our view this submission is unfounded. It is true that the charge initially identified the deceased as Selvam Muthusamy but the charge was subsequently amended to read Selvam.

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Second issue: Whether Menaga a credible witness

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[28] The next complaint is that the trial judge had erred in accepting Menaga's evidence on the issue of confession. Counsel attempted to demonstrate that there were contradictions in her evidence on this issue and this made her evidence unsafe. We have considered the detailed arguments advanced. The short answer is that these were all matters within the fact-finding province of the trial judge. He was fully aware that Menaga's evidence was crucial in this case. He was also fully aware that she had no reason to falsely implicate the appellant.

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[29] In our view, the conclusion of the trial judge that the appellant had confessed to Menaga is a finding of fact which we would hesitate to disturb unless it can be shown that it was clearly reached against the weight of the evidence. Such was not the case here. As such, we are not persuaded that there is merit in this ground of appeal.

Third issue: Defence not considered

[30] The third ground of appeal is based on the complaint that the trial judge had failed to adequately consider the defence of the appellant. It is argued that the appellant had maintained at all times that the only person who had committed the assault on Selvam on the date in question was Thanabalan. They were not involved and had restrained Thanabalan from continuing to assault Selvam.

[31] The appellant's counsel criticised the trial judge's treatment of the appellant's evidence submitting that the evidence threw doubt on the case for the prosecution that the appellant was also involved in the assault of Selvam. It was argued that the trial judge in rejecting the appellant's defence had failed to consider that only Thanabalan's DNA was found on Selvam.

[32] We find no merit in this complaint as well. It is clear from the grounds of judgment that the trial judge had considered it but found that it could not be true. We agree with the trial judge that it makes no sense and is unbelievable that Thanabalan would commit an unprovoked and brutal assault on Selvam when he had no motive to do so. The one who was angry with Selvam was the appellant as the latter had used up the monies he and Menaga had saved to get married. In our view, the fact that only Thanabalan's DNA was found on Selvam does not *ipso facto* mean that the other two had not participated in the assault.

Fourth issue: Whether Selvam died due to injuries sustained

[33] The fourth ground of appeal is premised on the evidence of the pathologist. It is argued that the pathologist had testified that Selvam could have been saved if he had received immediate medical treatment for his head injuries. It was pointed out that there was uncontroverted evidence that Selvam had received treatment in Hospital Tengku Jaafar Seremban and the neurosurgical wad in Kuala Lumpur General Hospital. None of the medical doctors who treated Selvam were called nor their reports produced to show the medical treatment he had received. Counsel argued that if they had been called, their evidence would have shown that the appellant's conviction should have been under s 304(b) instead of s 304(a) Penal Code.

[34] Counsel for the appellant conceded that this was a point outside the petition of appeal and was neither in issue in the court below. It was his contention that he was entitled to raise it at this appeal as it was a point of law.

[35] In our view, the appellant must abide by the petition of appeal and should submit solely on the points of law or fact as set out in the petition of

appeal and should not seek to raise points of law or fact not set out in the petition of appeal. In any event, it is clear from the evidence given by the pathologist in the instant case that even if Selvam had received intensive medical treatment, there was only a very slim chance that he would have survived.

Fifth issue: Sentence

[36] Having upheld the appellant's conviction under s 304(a) of the Penal Code, it remains for us to consider the whether the 18-year imprisonment term the trial judge imposed was warranted. The range of sentences under s 304(a) is provided for as follows:

> 304 Punishment for culpable homicide not amounting to murder
>
> Whoever commits culpable homicide not amounting to murder shall be punished —
>
> (a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act which by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or
>
> (b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[37] Counsel submitted that the appellant was only 26 years of age at the time of the offence. The appellant comes from a poor family and his mother was a cleaner in school. He has served eight years in prison for this offence. Counsel asked the sentence to be reduced to eight years so that the appellant could be immediately released.

[38] It is trite law that an appellate court would not ordinarily disturb the sentence imposed by the trial court except in any of the following circumstances: (a) where it was satisfied that the trial judge erred with respect to the proper factual basis for sentencing; (b) the trial judge failed to appreciate the materials placed before him; (c) the sentence was wrong in principle; or (d) the sentence was manifestly excessive or manifestly inadequate. As regards the question of what is manifestly excessive or manifestly inadequate, it is also settled that the threshold would only be met if there was a need for a substantial alteration to the sentence rather than an insignificant correction to remedy the injustice.

[39] In imposing 18 years the trial judge had considered the nature of the offence. The fact that Selvam had used the monies saved for the appellant's

upcoming wedding, did not provide the appellant with any just cause to assault Selvam. The assault was unprovoked and committed on a harmless person. Selvam was grossly outnumbered when the appellant and his friends ganged up to inflict blows mercilessly on him with a stick. Selvam's plight and cries did not seem to have moved them at all. They had left the unconscious Selvam in an open ground near the school to ensure that they were not implicated with the offence.

[40] Given the facts in this case, we are unable to agree with the appellant's counsel that the sentence was manifestly excessive.

CONCLUSION

[41] For the reasons given, we dismissed the appeal on conviction and sentence.

Appeal dismissed.

Reported by Ahmad Ismail